

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of
the City of Santa Barbara for
Review of Water Quality Staff
Determinations, Grants Section

Order No. WQ.73-17

BY BOARD MEMBER MAUGHAN:

By letter dated May 16, 1973, the City of Santa Barbara (Petitioner) requested the State Water Resources Control Board (State Board) to review certain determinations of the staff of the Division of Water Quality of the State Board (Staff). These determinations relate generally to capacity and eligible project costs of Petitioner's proposed treatment works.

A hearing was held on the petition on June 15, 1973. The determinations complained of at the time of hearing were as follows:

1. A determination by Staff that the provisions of Section 2144, Subchapter 7, Chapter 3, Title 23, California Administrative Code, as amended on February 15, 1973, should be applied to Petitioner's project, and that capacity for grant purposes is to be determined pursuant to that section.
2. A determination by Staff that any redesign costs occasioned by reduction of project capacity are not eligible for a grant and that such costs must be borne entirely by the Petitioner.
3. A determination by Staff that the cost of the sand filtration system of Petitioner's project is not eligible for grant.

The contentions of Petitioner at the time of hearing were as follows:

1. The provisions of Section 2144, as amended on February 15, 1973, should not be retroactively applied to Petitioner's project, and capacity for the project should be determined under the provisions of Section 2144 as it stood prior to February 15, 1973.

2. Under the particular circumstances of this case, if capacity of the proposed project is to be reduced, necessary costs of redesign should be included as a part of eligible project cost.

3. The sand filtration system is necessary to meet existing waste discharge requirements which in effect will require that the treatment works produce an effluent which at no time exceeds 100 mg/l suspended solids, and that the cost of such system should therefore be included as a part of eligible project cost.

SUMMARY OF FACTS

On March 25, 1970, Petitioner applied for a grant for the construction of a proposed project. As a part of the application process, a project report was prepared and submitted by the Petitioner in November of 1971. The project report was reviewed by Staff, and on March 2, 1972, the Petitioner was advised by letter from Staff that "the concept proposed was approved." The same letter specifically notified the Petitioner that "before

formal project report approval will be possible" additional information would be required.

In March of 1972, revised waste discharge requirements applicable to the Petitioner were adopted by the Central Coast Regional Board (Regional Board) which, in part, provided:

"Final plans and specifications for the planned plant expansion shall be submitted prior to May 1, 1972, or in accordance with a deferred time schedule established by the State Water Resources Control Board."

In April of 1972, the Petitioner's bond issue necessary to provide funds for Petitioner's share of project costs failed to pass. By virtue of this, the project, which had originally been scheduled by Staff for a fiscal year 1971-72 project, was necessarily carried forward and became a 1972-73 project.

In June of 1972, as a part of a cease and desist order, the Petitioner was found by the Regional Board to have delayed preparation of plans and specifications contrary to waste discharge requirements, and the Petitioner was ordered to cease and desist violation of requirements.

In July of 1972, although formal project report approval had not been received, Petitioner instructed its consultants to proceed forthwith with the preparation of plans and specifications.

At the time of preparation of the plans, Section 2144, as it applied to Petitioner, generally limited capacity for grant purposes to two times the capacity needed to serve existing development within the service area of Petitioner, or necessary capacity projected in the service area 20 years from start of construction, whichever was less. On February 15, 1973, by emergency regulation, Section 2144, as it applies to Petitioner, was amended to reduce

the capacity eligible to grant to 1.5 times the capacity needed to serve existing development within the service area of Petitioner, or necessary capacity projected in the service area 10 years from start of construction, whichever is less.

It is not disputed that the capacity needed to serve existing development within the service area of Petitioner is 8 mgd. Under prior Section 2144, capacity eligible for a grant would be 16 mgd, or less, depending on necessary projections. Under present Section 2144, capacity eligible for grant would be 12 mgd, or less, again depending on necessary projections. The project was designed for 16 mgd capacity.

FINDINGS AND CONCLUSIONS

Having considered the contentions of the Petitioner, and the evidence, we find and conclude as follows:

1. Findings on Eligible Capacity. The capacity of the proposed project of Petitioner eligible for grant assistance is limited by the provisions of Section 2144, as amended on February 15, 1973. Capacity eligible for grant assistance is consequently limited to 11 mgd.

Section 2144, as amended on February 15, 1973, was intended by the State Board to apply to all fiscal year 1972-73 projects, including carry-over projects such as that of Petitioner. We do not regard this determination as involving any retroactive application of Section 2144, as amended, to the project of Petitioner. The Petitioner did not in fact, on February 15, 1973,

have any vested rights which have been retroactively affected by amendment of Section 2144. A state grant contract had not been executed, nor had the proposed project been certified to EPA pursuant to federal law. As a matter of fact, formal project report approval had not yet been given. Consequently, it is clear to us that Petitioner had no vested right to funding or to certification, and certainly had no vested right to funding or certification for a capacity of 16 mgd.

On the question of retroactivity we would also add that Section 2144 does not now, and never has, limited the right of a municipality to size its treatment works as it sees fit. Section 2144 merely limits the capacity which is fundable through state and federal grant moneys. This limitation of grant eligibility is necessary to effectively allocate limited grant funds in order to achieve maximum protection of water quality.

2. Findings on Eligibility of Redesign Costs. Petitioner contends that if Section 2144, as amended, is applied to its project, Petitioner will have to redesign the project, including revision of plans and specifications, since Petitioner cannot finance the construction of a 16 mgd facility if capacity for grant purposes is limited to 12 mgd, or less. Since eligible capacity is limited by Section 2144, as amended, it seems apparent that redesign costs will be incurred in connection with this project.

As a rule, redesign costs, including costs of revision of plans and specifications, occasioned by erroneous or improper original design, are not eligible project costs. The position of

Staff is that Petitioner should not have proceeded to prepare plans and specifications until formal project report approval had been given, and that any redesign costs of Petitioner should be paid by Petitioner. Ordinarily, we would concur in the Staff determination without question. However, under the particular circumstances of this case, we have concluded that reasonable and necessary redesign costs occasioned by revision of plans and specifications to reduce project capacity to the limit of eligible capacity should be considered as an eligible project cost.

Our conclusion is based on the following facts:

1. It was customary procedure at the time for work on plans and specifications to commence when "concept approval" for a project was given. While the letter of March 2, 1972, was not "concept approval" in the customary sense, since it was not intended nor apparently understood by Petitioner's consultants to constitute approval of eligible capacity, it seems to us to be overly technical to insist that Petitioner be required to distinguish between that "concept approval" which will allow proceeding to plans and specifications and that "concept approval" which will not permit the preparation of plans and specifications.

2. The various actions of the Regional Board could have been reasonably understood by Petitioner to at least imply that Petitioner should proceed to prepare plans and specifications. Again, it is true that technically the Petitioner could have complied with the Regional Board orders involved by obtaining an extension of time from Staff, since the time limit expressed in the various orders actually required compliance by a date certain

or at a later time approved by the State Board. However, within the overall context of the circumstances as they stood at the time involved, we feel that the action of Petitioner in proceeding to prepare plans and specifications was made in good faith and was not improvident.

Since such is our finding, we do not believe that, in proceeding to prepare plans and specifications, the Petitioner could have foreseen the possibility of amendment of Section 2144 and the effect thereof.

In this connection, we wish to make one further comment. The necessity to redesign will increase project costs in two ways, including increase due to the cost of redesign itself and increased project cost due to necessary delay of construction. These additional costs can be reduced by keeping redesign within the minimum limits required to fulfill Section 2144. We will expect Petitioner to cooperate toward this goal, since it is only those costs which are reasonable and necessary which are grant eligible in any event.

3. Findings on Eligibility of Sand Filtration System.

Petitioner contends that this system is necessary to meet the waste discharge requirements which are applicable to it, particularly the requirement that suspended solids in the effluent at no time shall exceed 100 mg/l, and that the cost of the system is therefore grant eligible.

Our present regulations, specifically Section 2132 thereof, provide that "grants shall be made available for construction

of facilities to assure compliance with appropriate waste discharge requirements." If the system involved is reasonably necessary to meet applicable waste discharge requirements, it is in fact a grant eligible item.

The present record before us does not establish, one way or the other, whether this system is reasonably necessary to meet current waste discharge requirements, or whether the system, if installed, will assure compliance with waste discharge requirements. In addition, some question as to the appropriateness of current waste discharge requirements, as they relate to suspended solids, is involved. The present record does not provide a basis for determination by the State Board as to appropriateness of current waste discharge requirements on suspended solids.

IT IS HEREBY ORDERED as follows:

1. The capacity of the proposed project for grant purposes is subject to the limitations of Section 2144, as amended February 15, 1973, and shall be limited to 11 mgd.

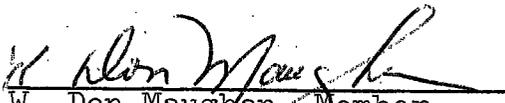
Staff shall define the service area for the project. Petitioner shall be immediately advised of the Staff determination.

2. Reasonable and necessary redesign costs to reduce the capacity of the proposed project to the capacity eligible for a grant will be treated as a part of eligible project cost. Staff is directed to make every effort to reduce redesign requirements to a minimum. Only those costs which are in fact reasonable and necessary will be considered as grant eligible, and in determining

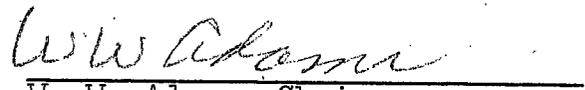
whether costs incurred for redesign are both reasonable and necessary, Staff is authorized to consider the diligence of Petitioner in completing redesign. Any unnecessary delay or lack of diligence in completing redesign which results in increase of construction costs shall be considered by Staff in determining whether redesign costs are in fact reasonable.

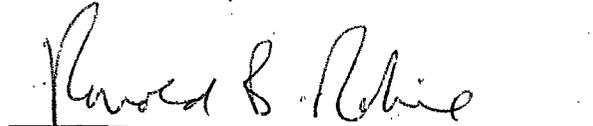
3. Staff shall consult with the Regional Board concerning the appropriateness of waste discharge requirements related to suspended solids. It is our recommendation that the requirement on suspended solids be reviewed by the Regional Board. The State Board reserves decision on the question of grant eligibility of the sand filtration system at this time.

Dated: July 5, 1973


W. Don Maughan, Member

We Concur:


W. W. Adams, Chairman


Ronald B. Robie, Vice Chairman


Roy E. Dodson, Member


Mrs. Carl H. (Jean) Auer, Member